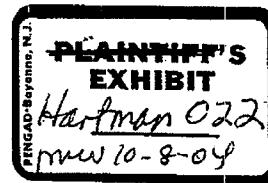


EXHIBIT A



1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3 * * * * *
4 UNITED STATES *
5 Plaintiff *
6 *
7 VERSUS * CR-01-10350-DPW
8 *
9 ALAN MACKENZIE, JANICE *
10 SWIRSKI, HENRY VAN MOURIK, *
11 DONNA TOM, DONALD PATTON, *
12 DONALD MEEK, ERIC OTTERBEIN *
13 RITA JOKIAHO, CAREY SMITH, *
14 MARK SMITH *
15 Defendants *
16 * * * * *

17 BEFORE THE HONORABLE DOUGLAS P. WOODLOCK
18 UNITED STATES DISTRICT COURT JUDGE
19 JURY TRIAL - DAY 39
20 JUNE 24, 2004

21 Courtroom No. 1 - 3rd Floor
22 1 Courthouse Way
23 Boston, Massachusetts 02210
24 9:00 A.M. - 12:00 P.M.

25 Pamela R. Owens -- Lee A. Marzilli
Official Court Reporters
John Joseph Moakley District Courthouse
1 Courthouse Way - Suite 3200
Boston, Massachusetts 02210

Method of Reporting: Computer-Aided Transcription

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1 APPEARANCES:
2 MICHAEL K. LOUCKS, ESQ. Chief, Health Care
3 Fraud Unit, GEORGE W. VIEN, ESQ., and SUSAN G.
4 WINKLER, ESQ., Assistant United States Attorneys,
U.S. Attorney's Office, 1 Courthouse Way, Suite
9200, Boston, Massachusetts 02210, on behalf of
the United States

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THE CLERK: This Honorable Court is now in session. Please be seated.

THE COURT: One specific question: Have the defendants filed their jury instructions? I just haven't seen them on the --

MR. KETTLEWELL: No. Actually, they haven't been filed, Your Honor. We're trying to file one set with all 10 people and we've circulated a draft and I think we're very close to having agreement on all of them.

THE COURT: Okay. I just didn't know if there was something --

MR. KETTLEWELL: They should be here -- they will be filed today.

THE COURT: All right. Now, let me outline the order of battle. Ms. Greenberg -- because the Government asked what the order is that we'll go through this, I think the way in which I'd like to do it is start with the broad objects of the conspiracy motions to frame the legal issues here. And specifically, I want to start with defraud the Government object, then the sampling law issues, and then I'll talk a little bit about an anti-kickback. But I think at that point, I'm going to want to start talking very specifically about particular defendants.

I would hope that -- there's a large body of material that was filed yesterday which I've tried to get through it, but I haven't, I think, fully absorbed it. But it's very helpful, I think, in framing the issues here. And, so, I'm going to use that as the agenda for the Government to respond in specific ways. What I think I anticipate happening is that I will be asking for specific citations to specific

9 transcript and to documents that have been introduced.
 10 And we can use the screen to do that so everybody gets
 11 to see it at the same time. That's my hope, anyway.
 12 Now, let me turn to this question of
 13 defrauding the Government. I framed it -- in just my
 14 kind of things to think about yesterday -- as what's the
 15 duty to disclose? There are terms of art involved, so
 16 that's a little misleading. But let me put it a
 17 different way. This is clearly an area in which the
 18 Federal Government and its various agencies has
 19 been struggling to develop a coherent pattern for
 20 reimbursement. And for a variety of reasons, it's hit
 21 on the idea about average wholesale price. And
 22 depending on the administration, people at OMB think
 23 that there's too much paperwork in trying to do a real
 24 evaluation of what these prices are. And people who are
 25 in the pharmaceutical business aren't really interested

1 in having the Government get too intrusive. And, so,
 2 they're perfectly happy if the Government is not
 3 directly involved in administering the prices except
 4 beyond the AWP. So, it's a yeasty area. But I'm not
 5 certain that there is any criminal violation for people
 6 to pursue their business in light of a structure that is
 7 as open-textured as this unless they are either lying to
 8 the Government in their presentation or they have some
 9 duty to disclose to the Government some aspect of the
 10 business. That, it seems to me, is at the core of what
 11 the defraud clause in this setting asks for. And, so, I
 12 guess I want to understand from the Government what it
 13 was that they were supposed to do, not what would have
 14 been nice for them, what would have been public-spirited
 15 for them to do, but what they were obligated to do.

16 MR. LOUCKS: Your Honor, thank you. I'll try
 17 to address the Court's questions.

18 Our prong (a) is predicated on two things, one
 19 of which is conspiring to defraud to obtain money or
 20 property. The second is conspiring to thwart the
 21 operations of the programs. Providing a kick- -- I
 22 mean, there have been a number of cases that have
 23 approved conspiring to defraud theories against the
 24 Medicare and Medicaid programs by paying kickbacks.
 25 The cases that have not approved it have been where

1 there has been no showing of a loss or an increased
 2 cost.

3 THE COURT: So you're saying that it's simply
 4 a duplication of the anti-kickback statute?

5 MR. LOUCKS: No. Because the anti-kickback

6 statute -- there are different elements in both.
7 The anti-kickback statute does not require proof of
8 loss. Conspiring to defraud requires proof of
9 conspiring to defraud to obtain money or property.
10 That's not a part of the anti-kickback statute.
11 THE COURT: So you've got to prove even more
12 for there to be conspiracy to defraud?
13 MR. LOUCKS: You have to prove an intent to
14 obtain money through the course of --
15 THE COURT: Right. But you've got to prove
16 something more?
17 MR. LOUCKS: Yes.
18 THE COURT: All right. So, what do you need
19 it for?
20 MR. LOUCKS: What do we need it for in this
21 case?
22 THE COURT: Right. I mean, it seems
23 replicative. As you've described it, the anti-kickback
24 statute is a lesser-included offense of defrauding the
25 Government on this prong.

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1 MR. LOUCKS: On this prong. There are
2 different intent aspects as well.
3 THE COURT: Yes. The intent is even easier on
4 the anti-kickback statute.
5 MR. LOUCKS: Actually, I thought it was the
6 other way around, Judge.
7 But our view is this, also, is that there
8 has been substantial proof of an intent to provide
9 inducements to get around reporting obligations on best
10 price.
11 THE COURT: Well, I'll get to that in a
12 minute. That's thwarting as far as I'm concerned.
13 Now I want to deal with this parallel kickback
14 theory. And I want to understand why it is that a jury
15 should be instructed on something like this that just
16 means another set of moving parts. You say that you've
17 got to prove loss. No, you don't have to do that with
18 the anti-kickback statute. Okay. So, as I said,
19 lesser-included offense. You say there is some
20 difference in intent. I'm not altogether sure.
21 MR. LOUCKS: I'm not sure, as a practical
22 matter, one could explain to a jury a difference in
23 intent between prong (a) and prong (b) where the
24 underlying conduct for both includes payment kickbacks.
25 We actually discussed this amongst ourselves, that

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1 there is a parallel between the two, that it would